time of demand for it and that their, the defendants', understanding must be understood to have been upon that condition,—in other words, that "the Company" cannot be held to have guaranteed the existence of such stock at such time. The agreement was to deliver stock of the *market* value of 2000£. Had the word "face" been used in place of the word "market," that fact might have lent some strength to defendants' argument. In that case the plaintiff clearly would be taking chances with reference, at least, to the actual value of the stock. We must presume, however, that the words "market value" were used advisedly and with knowledge of the fact that they have a well-known signification and that at times they import something very different in amount from "face value." This language of the contract, in our opinion, discloses an intention on the part of the parties thereto that the plaintiff should, in the event of dissatisfaction, taking no chances at all, not even with reference to value, be reimbursed the amount of his loss,—in other words, shows that the defendants, and not the plaintiff, assumed the risk as to the existence of the stock. The agreement under consideration, by reason of its language, is not one of the class to which that in *Boeler v. Ahlo*, 11 Haw. 357, belonged.

It is further urged (d) that the Company could not possibly have intended to guarantee the existence of stock of the market value of 2000£ or of any stock at all because there was no consideration for such promise and such an undertaking would therefore be unbusiness-like and improbable. We fail to perceive any force in this argument. So far as appears from the face of the declaration the "Company" contributed nothing to "the partnership hereby formed" other than the right to use in the Colony of Tasmania certain formulas for the cure of alcoholism and narcotism and its proportional share of such small sum as was necessary to defray the expenses of entering upon the proposed business. The plaintiff, on the other hand, paid to "the Company" 2000£ in cash for his interest in "the partnership hereby formed" in addition to paying his share of the expenses just mentioned. In other words, Harrison paid the substantial sum stated in order to be permitted to join in the experiment about to be made of curing alcoholism and narcotism and in the profits, if any, derivable therefrom. That the result of the experiment and the success of the venture were regarded at that time by the parties themselves as highly problematical, is at once apparent from the terms of the agreement, and not only is it not to be wondered at but it is natural to expect that the plaintiff before consenting to put his money in a venture of this sort and to proceed to Tasmania to do the actual work of the partnership, would have obtained a stipulation securing to him the return of his money in case of failure and the placing of the parties in their original position. There is no unfairness to the Company in such an agreement if it was voluntarily entered into. The consideration for the promise was ample.

(e) It does not appear that the plaintiff held any certificate or other evidence of his share in "the partnership hereby formed" and the inference is that he did not. There was nothing tangible, then, which he could have tendered. It is averred in the declaration that the plaintiff became dissatisfied with the condition of the business, that he notified his partners to that effect and that he "made demand upon said partners that under the terms of paragraph 4 of said agreement, they should deliver to him stock of the market value of Two Thousand Pounds (2000£) in some District other than Tasmania of the field of operations of said partnership." This is a sufficient allegation that the stock demanded was demanded in accordance with the terms of paragraph 4, to wit, in exchange for his intangible interest in "the partnership hereby formed." It is in fact an averment of such a demand accompanied by an offer to give in exchange his intangible interest. Plaintiff did all that by the terms of the contract he was required to do in order to become entitled to the relief demanded.

It is also contended that the agreement, and therefore the declaration, is ambiguous and uncertain inasmuch as it is impossible to ascertain therefrom what stock is meant in Clause 4. Assuming, but not deciding, that the language in this respect is ambiguous, that fact might prove a serious obstacle to the maintenance of a suit for specific performance praying for the delivery of the stock itself; but such is not the nature of this suit. The defendants have failed and refused to deliver *any* stock, and the action is merely one for the damages resulting from such failure and refusal. Whatever stock was intended, plaintiff would be entitled to at least nominal damages, since the agreement was not, as already held, conditional upon the *existence* of the stock and since, therefore, there was a breach of the agreement.

One further objection is made that there is no allegation in the declaration that the attorneys-in-fact who signed the agreement for some of the defendants were duly authorized so to do. We think that the allegation that the defendants, naming them, entered into the agreement, is sufficient on demurrer.

6, 7 and 8. These grounds of demurrer are based on the fact that the plaintiff, Gilmore and the persons composing "the Company" became, by virtue of the agreement, partners in "the partnership hereby formed." The contention is that the present controversy is one between partners, relating to a partnership transaction, that there has been no final settlement or accounting between the partners, and that under the circumstances the plaintiff's remedy is in equity and not at law. The general rule undoubtedly is that "an action at law will not lie in favor of one or more partners or their representatives against one or more partners or their representatives upon a demand growing out of a partnership transaction until there has been a settlement of accounts and a balance struck."—15 Encycl. Pl. & Pr. 1005. There are two reasons for this rule, one, that in an action against a partnership of which the plaintiff is a member, the plaintiff himself would also be a defendant inasmuch as he would recover, if at all, in part from himself or from a fund in which he had an interest, and that this would present a state of affairs to parties not permitted at law; the other reason "is found in the inherent nature of the partnership relation and consists simply in the fact that prior to an accounting and settlement of partnership affairs no cause of action exists between the partners founded solely upon partnership dealings, except an equitable action for an accounting and settlement of the affairs of the partnership;" (15 Encycl. Pl. & Pr. 1008) in other words, prior to such settlement it cannot be said what, if anything, is due.

Neither of these reasons exist, and therefore the rule itself does not apply, in the case at bar. The plaintiff is not in any sense making himself a party defendant; he is not suing any partnership of which he is a member. The recovery which he seeks is solely from "the Company" or its members and not from "the partnership hereby formed." He has no interest in "the Company" as a member, or in its property (except the enforcement of the present cause of action), although its members are his partners in "the partnership hereby formed." If he recovers judgment against "the Company" or any or all of its members, no property of his or in which he has any interest will become liable for the satisfaction of that judgment.

The allegation concerning an accounting contained in the declaration is really unnecessary. The cause of action is distinct and does not in any way involve a consideration of the partnership accounts or dealings.

We believe the law to be that "where the cause of action is distinct from the partnership accounts, and does not involve their consideration, or require their examination, an action at law will lie thereon between the partners;" that "an action at law lies upon express individual and personal contracts between partners, and it is immaterial whether such contracts relate to the partnership affairs or are wholly distinct therefrom," and that "if partners, by an express agreement, separate a distinct matter from the partnership dealings, and one expressly agrees to pay the other a specific sum for that matter assumpsit will lie on that contract although the matter arose from their partnership dealings." (15 Encycl. Pl. & Pr., 1034, 1043, 1044 and 1048.) These partners, in order to successfully launch, "the partnership hereby formed," entered into a preliminary contract whereby certain of them agreed to purchase the plaintiff's interest in the concern upon the happening of a certain contingency. The transaction was purely one between the individuals, not in their capacity of partners. Gilmore was not in any way concerned in the agreement as to the purchase of Harrison's interest, and Harrison likewise was in no way concerned in the agreement as to the purchase of Gilmore's interest. It is just as though one only of the partners had agreed to buy out Gilmore for a specific sum, and another to buy out Harrison for another specific sum.

"If by the articles a continuing partner is, on dissolution, to pay the retiring partner a specified sum, the latter may recover it at law, even though on adjustment of the accounts he would be debtor to the firm."—2 Bates on Partnership, §890. See also Ib., §§874, 889.

"So there may be special bargains between the partners, by which particular transactions are insulated and separated from the winding up; and a single partner be substituted in place of the firm. Such is the common case of a partner retiring and selling out his interest to the continuing partners, who assume the debts. The retiring partner can sue them at law for the purchase price of his interest, which they had agreed to give, or for the amount of any debt he has had to pay."—Ib. §891.

"The fact that the partnership affairs have never been adjusted even though an adjustment thereof would show a balance due the defendant from the plaintiff is no impediment to the maintenance of this action. The agreement is for the payment, in a certain contingency, of a specific sum of money by one party to the other in case of a dissolution of the partnership. The party who becomes liable under the contract to pay such money, is the debtor of the other party; and the latter may maintain an action against him therefor, without regard to the partnership relations formerly existing between them or the state of their partnership accounts."—*Read v. Nevitt*, 41 Wis. 352, 353. See also *Edens v. Williams*, 36 Ill. 252; *Wetherbee v. Potter*, 99 Mass. 363; *Edwards v. Remington*, 51 Wis. 343.

5. The allegation of the declaration on this subject is, "that at the time of said action and the rendition of the judgment therein, hereinafter mentioned, the said Court was a Court of Record in said City, having jurisdiction over the parties plaintiff and defendant, and also of the subject matter in and of the said action." This, in our opinion, is sufficient. It is an allegation of facts and not of law. To be sure, it is a brief, summarized statement of the facts, but the evidence showing those facts need not be set out in the declaration. The statutes governing the New Zealand court are merely a part of such evidence and will have to be proved at the trial in the same manner as any other fact. It appears from the face of the declaration that the present defendants were, at the time of the execution of the agreement, and are now residents of Honolulu, although, it also appears, defendant Ables was in Auckland at the date here first mentioned. It is argued that the inference is that all of the present defendants were residents of Honolulu and out of the jurisdiction of the New Zealand court at the time of the institution of the action and the rendition of the judgment, and that therefore the declaration expressly shows that, on the doctrine of *Pennoyer v. Neff*, 95 U. S. 719, the judgment is invalid for lack of jurisdiction by the Court in that action over the persons of those who are defendants in this action. It is unnecessary to decide at this time whether or not the New Zealand court could have acquired jurisdiction over these defendants, if absent, by constructive service by publication, for it may be that they were present, and that direct service was made or that they voluntarily submitted to the jurisdiction. Such inference, if any, of the nature stated, as may arise out of the other averments of the declaration, is overcome by the positive averment that the New Zealand court did have jurisdiction over the persons of the defendants. Nor do the authorities cited, *Galpin v. Page*, 18 Wall. 350, 367, 368, and *Wilbur v. Abbott*, 6 Fed. 814, as we understand them, go to the extent of holding to the contrary. The decision in *Galpin v. Page* was as to the validity and effect of certain decrees introduced in evidence and collaterally attacked in a subsequent proceeding, and was not on demurrer. The Court there said: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over proceedings which are in accordance with the course of the common law. * * *

"The tribunals of one State have no jurisdiction over the persons of other States unless found within their territorial limits, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy. * * *

"Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." The presumptions referred to are those which have been held to arise from a record of a court of superior jurisdiction which is silent as to the matters concerning its jurisdiction in the particular case. These quotations may be more in point at the trial after the record of the New Zealand court is proven in evidence. The language used recognizes the possibility already herein pointed out of a court acquiring jurisdiction over the persons of non-residents. The plaintiff in the declaration in the case at bar is not relying on presumptions but on an express allegation.

The report of the case of *Wilbur v. Abbott, supra*, does not expressly state whether or not the declaration contained any allegation on the subject of the jurisdiction of the court which rendered the judgment declared on, but the strong inference is that there was no such allegation. The decision holds that, it appearing that the judgment debtors resided out of the State when the judgment was rendered, "no presumption can arise that they were duly served with notice of the suit in which the judgment was rendered or that they appeared and answered thereto." The case is distinguishable from that at bar in the particular already pointed out, and the decision does not apply.

The citation from 2 Black on judgments, §875, makes clearer the distinction sought to be drawn between the case last referred to and that at bar. The plaintiff in *Wilbur v. Abbott* in framing his declaration, evidently relied on the rule stated by Black that, "in bringing suit on a judgment rendered by a court of record in another State, it is not necessary for the plaintiff to aver that the court had jurisdiction either of the person or subject matter, or to set out the facts conferring jurisdiction; for jurisdiction is presumed to have existed until the contrary is clearly shown by way of defense to the action. It is proper, however, and perhaps necessary to allege that the court rendering the judgment was one of general jurisdiction, or a court of record, or to describe it in such terms that this fact may appear as a necessary inference." The court practically took the view that such a presumption was insufficient to sustain the pleading where it affirmatively appeared on its face that the defendants were non-residents; and Black in the same section says: "if, however, it should appear from the record that the judgment was against a non-resident, it seems that an exception must be made to the general rule." The plaintiff before us has recognized this exception, or, perhaps, that equally favorable presumptions, in pleading, do not attend the judgment of a foreign court as attend that of a court of a sister State, and has accordingly made an express allegation to avoid the difficulty.

Two decisions which, though arising out of the interpretation of particular statutes, are valuable for the light which they throw on the question of the sufficiency of such an allegation as that contained in this plaintiff's declaration, are those in the cases of *Brownell v. The Town of Greenwich*, 114 N. Y. 518, 527, and *Fisher, Brown & Co. v. Fielding*, 67 Conn. 91, 102, 103. In the first of these, a case submitted under the Code, the agreed statement was that the county judge "duly adjudged, determined and ordered" to a certain effect in certain proceedings, and counsel contended, as in the case at bar, that the facts giving the jurisdiction must be alleged and proven. The Court said: "The expression 'duly adjudged,' as used in the statement for the submission of this controversy, therefore, means adjudged according to law, that is, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment, including the defendant. A judicial officer has jurisdiction, when he has power to inquire into the facts, to apply the law and to pronounce the judgment. Any step in the cause or proceeding before him is necessarily the exercise of jurisdiction, and that step cannot be 'duly' taken unless jurisdiction exists. The final step, in particular, the making of the judgment, cannot be 'duly' taken unless all of the preliminary steps upon which it is based have likewise been duly taken."

Fisher, Brown & Co. v. Fielding, supra, was an action brought in Connecticut on a judgment obtained in England. The plaintiff simply averred that the foreign court "duly adjudged" that the defendant should pay to the plaintiffs, etc. Defendant demurred for want of allegations that the court in question had jurisdiction of the alleged action, or of the subject matter, or of the parties; or that the defendant had notice of the action, or was summoned to appear therein, or did in fact appear; or that there was any hearing or trial. On appeal, the Supreme Court of Connecticut said:

"The plaintiffs' complaint was drawn in the form authorized by the Practice Book (No. 169, p. 107) in actions on a foreign judgment. In actions on a domestic judgment, the authorized forms (Practice Book, No. 166 and No. 167, pp. 106, 107) state the fact, but not the manner of its recovery; but in declaring on the judgment of a foreign court, the approved averment is that such court, 'in an action therein pending between the plaintiffs and the defendant, duly adjudged that the defendant should pay to the plaintiffs' the sum in qestion. No court can 'duly' adjudge such a payment, except in an action conducted in due course of law. Due course or process of law, with respect to such a judicial proceeding, necessarily involves reasonable notice to the defendant of the institution and nature of the action, given (unless this be waived), if he be a non-resident, by personal service within the jurisdiction, and a fair opportunity to be heard before a tribunal of competent jurisdiction. So much is due to every person from whom another seeks to recover in a judicial controversy before a court of justice. *Pennoyer v. Neff*, 95 U. S. 714, 733.

"In the case of a domestic judgment, it is unnecessary to allege that these conditions have been fulfilled, because our law

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